

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 8, 2005

SECRETARY OF LABOR,	:	Docket No. WEVA 2005-173
MINE SAFETY AND HEALTH	:	Case No. 00057242 A
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2005-174
v.	:	Case No. 00052743 A
	:	
GARY D. NEIL, and	:	Docket No. WEVA 2005-175
DEMPSEY W. PETRY, and	:	Case No. 00052744 A
STEPHEN L. FRUSH, and	:	
RICHARD C. KIM,	:	Docket No. WEVA 2005-176
employed by ELK RUN COAL CO.	:	Case No. 00052745 A
	:	Mine ID 46-07009

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”).<sup>1</sup> On July 18, 2005, the Commission received separate (though largely identical) motions made by counsel on behalf of Gary D. Neil, Dempsey W. Petry, Stephen L. Frush, and Richard C. Kim, all employees of Elk Run Coal Co. (“the respondents”), to reopen penalty assessments against each employee under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2005-173, WEVA 2005-174, WEVA 2005-175, and WEVA 2005-176, in which all the respondents are employees of Elk Run Coal Co., and which all involve similar procedural issues. 29 C.F.R. § 2700.12.

of the Commission. 29 C.F.R. § 2700.27.

In the respondents' motions to reopen, their counsel states that she did not discover that the Department of Labor's Mine Safety and Health Administration ("MSHA") had proposed penalties against the respondents until May 26, 2005, when Commission Administrative Law Judge Gary Melick lifted a stay in related proceedings, *Elk Run Coal Co.*, WEVA 2005-30. Mot. at 2. Upon investigation, counsel determined that MSHA mailed proposed penalty assessments to each of the respondents at her office (addressed simply to the respondents, not to or in care of counsel), and that the assessments were signed for by her receptionist on March 21, 2005. *Id.* at 3. Counsel further states that she and her firm have "conducted a thorough internal investigation and have been unable to locate the documents or determine what happened to them." *Id.* The Secretary does not oppose any of the respondents' requests for relief.

Commission Procedural Rule 25 states that the "Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment." 29 C.F.R. § 2700.25. (emphasis added). Counsel states that as a result of the penalty proposals being lost, none of the respondents ever "received the assessment documents." Mot. at 4. Though the respondents at some point in time received actual notice of the proposed assessments, it cannot be determined from the pleadings when such notice was received.<sup>2</sup>

The Commission possesses jurisdiction to reopen uncontested assessments that have become final Commission orders. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. See 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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<sup>2</sup> The confusion generated in this matter arises, in large part, from the manner in which the proposed penalty assessments were sent to the respondents. That confusion could have been avoided had the Secretary sent the penalty proposals to the respondents at their home addresses or "in care of" counsel at counsel's address.

Having reviewed the respondents' motions, in the interests of justice, we remand these matters to the Chief Administrative Law Judge to determine whether good cause exists to reopen these proceedings. If it is determined that such relief is appropriate, these cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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